A **SHAYO (M) SDN BHD**

v.

NURLIEDA SIDEK & ORS

B HIGH COURT MALAYA, IPOH
HARMINDAR SINGH DHALIWAL J
[CIVIL SUIT NO: 22NCVC-40-03/2012]
18 OCTOBER 2012

C ***LAND LAW:*** *Indefeasibility of title and interests - Fraud - Plaintiff's name as registered proprietor of land fraudulently removed when land registration system computerised - Computerised title for plaintiff's land issued in name of third party without plaintiff's knowledge - Whether Registrar of Titles and Director of Lands and Mines grossly negligent and*
D *breached statutory duties in allowing fraud in land office to continue unchecked - Whether computerised title to third party nullity and gave no protection to subsequent bona fide purchasers for value - Whether plaintiff should be restored as registered owner of land*

E The plaintiff had been the registered owner of a piece of land ('the land') since 1994 and at all material times had possession of the original Issue Document of Title ('IDT') to the land. Sometime in April 2001, the eighth to the 12 defendants ('D8-D12') began an exercise to computerise the land registration
F system in Perak pursuant to s. 5A, read with Schedule 14, of the National Land Code ('NLC'). The exercise involved conversion of the existing Register Documents of Title and the IDTs into computer-printed ones. Several years after the computerised system was implemented, the plaintiff discovered that for two consecutive years the notices it received from the land office to
G pay quit rent were addressed to the fourth defendant ('D4'). Upon checking with the land office the plaintiff was shocked to find the land was no longer in its name. The records showed that in 2002 a computerised IDT for the land was issued to the first defendant ('D1') who, by way of Power of Attorney, 'sold' the
H land to the second defendant ('D2'). Some years later, D2, as attorney for D1, sold the land to the third, fourth and fifth defendants ('D3-D5'), who became registered owners of the land. Some years thereafter, D3-D5 sold the land to the sixth defendant
I ('D6'), who in turn sold the land to the seventh defendant ('D7').

It was only after D7 had bought the land from D6 and before he had been registered as its owner that the plaintiff discovered the fact of his dispossession. The plaintiff lodged a police report and caused a registrar's caveat to be entered on the land to maintain the *status quo*. However, without notice to the plaintiff, the Registrar of Titles on D6's application removed the registrar's caveat and allowed D7 to be registered as owner of the land. The plaintiff brought the instant action to restore itself as the registered owner of the land. Alternatively, it claimed for damages against D8-D12 for breach of statutory duty and negligence if it failed to get back the land. The plaintiff obtained judgment in default against D1. D7 claimed he was a *bona fide* purchaser for valuable consideration and counterclaimed for vacant possession of the land. Alternatively, he, like D2-D6, claimed for contribution and indemnity against D8-D12 for whatever losses they might suffer in the event the transfers of the land were declared invalid. D8-D12 claimed they had carried out their duties in good faith; that there was no evidence they were responsible for issuing the title to D1 and that the government and its agencies could not be held liable for negligence as the plaintiff had failed to specifically name and make as a party to the action the actual government employee responsible for the alleged tortious act.

Held (allowing the plaintiffs' claim, dismissing D7's counterclaim, ordering D8-D12 to indemnify D7 for the purchase price he paid for the land and other reasonable expenses he had incurred in procuring the land, which amount, if not agreed, was to be assessed by the court and ordering D8-D12 to pay the plaintiff RM60,000 costs and to pay D2-D7 RM20,000 costs each):

(1) The issuance of a computerised IDT in the name of D1, being a breach of the provisions of the 14th Schedule of the NLC, was *ultra vires* and unlawful and deprived the plaintiff of its land in violation of art. 13(1) of the Federal Constitution. (para 34)

(2) The IDT issued in D1's name was a nullity and void with the effect that any other instruments executed thereon were also void and liable to be set aside at the instance of the rightful registered proprietor. In view of the void title at its inception, subsequent *bona fide* purchasers for value could not avail

A themselves of the protection afforded by the proviso to sub-section (3) of s. 340 of the NLC. The title issued to D7 had to be cancelled and the plaintiff restored as the registered proprietor and true legal and beneficial owner of the land. (paras 35 & 38)

B

(3) The issuance of a second title for the land to D1 – when the original manual IDT continued to be in the plaintiff's possession and was the valid title – was without doubt due to a grave failure by D8-D12 to adhere to the strict
C mandatory provisions set out in the 14th Schedule of the NLC. D8-D12 had failed to ensure reasonable or adequate security of their computer system. With the computer system under their control it could not lie in their mouths to say they were not responsible for any misuse of the computer system.
D (paras 33 & 47)

(4) The irresistible supposition was that fraud was going on within the offices of D8-D12. No inquiry was conducted to ascertain how D1 could have been issued with a computerised IDT. Despite a departmental report regarding the falsification of the
E title to the land having been prepared in 2009, no registrar's caveat was lodged on the land until March 2011. No further investigation was done and in fact D8-D12 thereafter allowed the land to be transferred twice more to D6 and D7. Even when the registrar's caveat was lodged D8-D12, despite being
F aware the plaintiff's interest in the land was at risk, did not think it fit to inform the plaintiff of D6's application to remove the caveat. D8-D12 were grossly negligent and in breach of their statutory duties. (paras 48, 51 & 53).

G **(5)** Under ss. 12 and 13 of the NLC designated officers of the government were charged with the responsibility of administrating the NLC and all things connected with it. These were the officers who were the persons responsible for the torts complained of here and they were the very same
H officers the plaintiff had named as defendants in this action. Section 16(2) of the NLC was also consistent with that approach. (paras 56 & 57)

(6) D7 had established liability on the part of D8-D12 for which
I he was entitled to be indemnified. (para 60)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Ministry of Housing and Local Government v. Sharp and Another [1970] 2 QB 223 ***(refd)***

Muthammal Rose Udayar & Anor v. ACP A Paramasivam & Ors [2011] 1 LNS 1565 HC ***(refd)***

Tan Chiw Thoo v. Tee Kim Kuay [1997] 1 CLJ 541 FC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 3 CLJ 271 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 66

Federal Constitution, art. 13(1)

National Land Code, ss. 5A, 8, 12, 13, 16(2), 22, 340(3), Sch. 14

For the plaintiff- Conrad Young (Sheanna Shanta with him); M/s Vidhya Sheanna Low & Partners

For the 2nd, 3rd, 4th & 5th defendants - Hoo Lin Coln; M/s Lin Coln & Co

For the 6th defendant - A Mariadass (Kamariah Mohd Kassim with him); M/s Mariadass Lock & Ainuddin

For the 7th defendant - Janet Wong Siang Ping; M/s CK Leong & Partners

For the 8th, 9th, 10th, 11th & 12th defendants - Mohd Hamzah Ismail; Asst. State Legal Adviser, Perak

Reported by Ashok Kumar

JUDGMENT

Harmindar Singh Dhaliwal J:

[1] The Torrens System of land registration embodied in the National Land Code ("NLC") was meant to provide security and certainty of title for landowners in Malaysia. With the advent of the computerization system of land registration in Malaysia, and which was begun in Perak sometime in 2001, the original manual title deed was to be replaced with a computerized one. Serious problems have however arisen in the implementation of this new system. If this case is any indication, some landowners in Perak will be having sleepless nights wondering if the titles they

A have in their possession are still valid because of the mischievous machinations and criminal inclinations of a few within and outside of the land registry.

[2] One such landowner is the plaintiff in the instant action. B Despite having been in legal and physical possession of its land since 1994, and having the original manual Issue Document of Title ("IDT") safely in its possession and custody, and having diligently paid its taxes and rates, the plaintiff now finds itself dispossessed of ownership of the land in so far as the C Computerized Land Registration System (commonly referred to by its Bahasa Malaysia acronym "SPTB" for "Sistem Pendaftaran Tanah Berkomputer") is concerned. The plaintiff's land was registered in the name of the 1st defendant ("D1") and then changed hands another three times. The plaintiff has now brought D this action to restore itself as the rightful proprietor of the land.

Background Facts

[3] The plaintiff's land, the subject of this case, was originally held under Geran 22446, Lot 14942, Mukim of Teja, District of E Kinta, Perak. It was later re-delienated from the District of Kinta to that of Kampar, and the grant number changed from 22446 to 126329. The lot number remained the same. For ease and consistency of reference, the land will be referred to as "Lot 14942".

F

[4] On 21 February 1994, the plaintiff purchased Lot 14942, which measured 6 acres 1 rod and 20 poles (6.4375 acres), from one Loh Kong Fatt. The manual IDT shows it to have been first issued on 14 August 1990 with Loh Kong Fatt as the original G proprietor. Thereafter the plaintiff was registered as the proprietor on 21 April 1994.

[5] The layout plan accompanying the manual IDT shows Lot 14942 to be landlocked. Apart from a short border it shares with H another piece of land, Lot 14941, the rest of it is surrounded by the lime stone hills of Gunong Kundoh. The other piece of land, Lot 14941, is also owned by the plaintiff. It is not disputed that one cannot access Lot 14942 except by going through Lot 14941. It is also not disputed that the plaintiff has at all times been in uninterrupted physical possession and enjoyment of Lot I 14942. PW1 (Shang Yong), of the plaintiff, stated unchallenged in his evidence that since 1997, he started deer farming on Lot 14942 which has carried on till today.

[6] However, sometime in 2011, it came to the attention of PW1 that something might have been amiss *vis-a-vis* Lot 14942. Throughout the years until 2010, the plaintiff duly received the quit rent bills for Lot 14942 in its name and addressed to the home address of PW1 at 3, Persiaran Gopeng Enam, Taman Golf, 31350 Ipoh. In 2010, PW1 received the quit rent bill as per usual at his home address in Ipoh. But it was in the name of the 4th defendant ("D4"). PW1 did not think much of this at the time, thinking it was an error by the land office and being secure in the fact that he had with him the manual IDT at all times.

[7] But when the 2011 quit rent bill came again with the name of D4 once again, the plaintiff decided to check. What was revealed was, to say the least, astounding. Lot 14942 no longer stood in the name of the plaintiff. The evidence unveiled with regard to Lot 14942 the following.

[8] On 12 June 2002, a computerized Issue Document of Title in Form 5BK ("Form 5BK" or "computerized IDT") appeared to have been issued in the name of the 1st defendant ("D1"). On 8 November 2006, D1 purported to sell to the 2nd defendant ("D2") by way of a grant of a Power of Attorney for a consideration of RM100,000. A private caveat was also entered by D2 on 9 November 2006.

[9] On 24 October 2006, a purported Sale and Purchase Agreement was executed by D2 (as attorney for D1) as vendor in favour of the 3rd, 4th and 5th defendants ("D3-D5") as purchasers. The consideration was stated to be RM100,000, and D3-D5 were registered as proprietors on 18 December 2007.

[10] On 23 December 2010, D3-D5 as vendor entered into a Sale and Purchase Agreement with the 6th defendant ("D6") as purchaser for a consideration of RM288,000. Following this, D6 was registered as proprietor on 2 March 2011. Very shortly, thereafter, that is to say on 8 March 2011, D6 as vendor entered into Sale and Purchase Agreement with the 7th defendant ("D7") as purchaser, for a stated consideration of RM1,402,104.80.

[11] However, consequent upon a police report lodged by PW1 complaining about the matters for which this case is now concerned, a registrar's caveat was entered on 16 March 2011, to maintain the *status quo* stating the reasons to be "untuk menghalang sebarang urusniaga kerana terdapat pindahmilik yang meragukan dari (the plaintiff) kepada (D1 Nurlieda)".

[12] The registrar's caveat came to be removed on 19 August 2011 upon the application of D6 made against the Registrar of Titles. Curiously, neither D6 nor the Registrar of Titles saw it fit to make the plaintiff a party or even notify the plaintiff of such application considering that the registrar's caveat was lodged to protect the plaintiff's interests. Following that, D7 was registered as proprietor on 6 October 2011, and it is D7 in whose name Lot 14942 stands today.

Issues For Trial

[13] Prior to the trial, the parties had agreed to the following issues:

(1) Whether the plaintiff is the true registered proprietor and the legal and beneficial owner of all that land known as Grant 22446 (now known as Grant 126329), Lot 14942, Mukim Teja, Daerah Kinta (now Daerah Kampar), Negeri Perak.

(2) Whether the computer printed document of title in Form 5BK issued on 12 June 2002 and stating the 1st defendant as the owner of the said land was issued in contravention of the provisions of the National Land Code and the 14th Schedule thereof and as such is a nullity and void.

(3) If Issue No. 2 above is answered in the affirmative, whether the subsequent transfers of the said land:

(a) from the 1st defendant to the 3rd, 4th and 5th defendants;

(b) from the 3rd, 4th and 5th defendants to the 6th defendant; and/or

(c) from the 6th defendant to the 7th defendant is/are likewise null and void.

(4) Whether the title of:

(a) the 1st defendant; and/or

(b) the 3rd, 4th and 5th defendants; and/or

(c) the 6th defendant; and/or

(d) the 7th defendant is/are defeasible.

(5) Whether:

(a) the 1st defendant; and/or

(b) the 3rd, 4th and 5th defendants; and/or

(c) the 6th defendant; and/or

(d) the 7th defendant is/are purchaser(s) in good faith and for valuable consideration (*bona fide* purchaser(s) for valuable consideration).

(6) Whether the 8th, 9th, 10th, 11th and 12th defendants were grossly negligent and/or in breach of their statutory duties in failing to protect the interest of the plaintiff the true registered proprietor and the legal and beneficial owner of the said land.

The Case For The Parties

[14] The plaintiff's primary claim was for the plaintiff to be restored to the register as the proprietor for Lot 14942. This part of the case is cast upon two premises. The first is what the plaintiff calls the void point in reliance on the case of *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271. This can also be called the "*ultra vires*" or "nullity" argument. The second premise is the "defeasibility point" which is predicated on the titles of D2 to D5, D6 and D7 for Lot 14942 being defeasible in any event. The third and alternative claim of the plaintiff is for damages for the loss of Lot 14942 against D8-D12 for breach of statutory duty and negligence in the event Lot 14942 is not restored to the plaintiff.

[15] D2 to D5's position is that they were *bona fide* purchasers for valuable consideration. In the event the transactions were to be declared invalid, D2 to D5 would seek for D8-D12 to contribute for whatever losses that would be sustained by them on account of negligence and breach of statutory duty.

[16] D6's position as can be gathered from the submissions is that D7's title must be cancelled as it was issued *vide* an *ultra vires* act committed by D8-D12. D6 submitted that the issue of whether he was a *bona fide* purchaser is irrelevant. D6 contended that it was for D8-D12 to compensate D7 for the loss.

[17] D7 contended that he is a *bona fide* purchaser for valuable consideration. He is counterclaiming for vacant possession of Lot 14942. In the event the plaintiff's claim for restoration of title is allowed, D7 is claiming for remedies against either D6 or D8 to D12 for their negligence and *ultra vires* act.

[18] D8-D12's position is that there is no evidence that it was they who issued the title to D1. They also contend that no tortfeaser has been named by the plaintiff for any claim in indemnity for negligence. They also contend that they had carried out their duties in good faith. They deny any negligence or breach of statutory duty.

The Void Issue

[19] To recap, the void issue was – whether the computer printed document of title in Form 5BK issued on 12 June 2002 and stating D1 as the owner of Lot 14942 was issued in contravention of the provisions of the National Land Code and the 14th Schedule thereof and as such is a nullity and void. If this is answered in the affirmative, the issue that follows is whether the subsequent transfers of Lot 14942 from D1 to D3, D4 and D5; from D3, D4 and D5 to D6; and/or from D6 to D7; is/are likewise null and void.

[20] The evidence revealed that in April 2001, D8-D12 embarked upon an exercise to convert land titles in Perak to computerized IDT's in Form 5BK. The governing statutory provision for this came from s. 5A NLC, as the enabling provision, to be read together with the 14th Schedule. Section 8 of the 14th Schedule sets out in some detail the process required to be followed in converting the existing register documents of title to the computer printed register documents of title. Section 8 appears as follows:

> **8. Conversion to computer register document of title**
>
> (1) Upon the coming into force of the Computerized Land Registration System in a land Registry, the Registrar shall convert the existing register documents of title to the computer printed register documents of title and shall sign and seal the same.
>
> (2) An existing register document of title shall continue to be in force and valid for all purposes of this Act until a computer printed register document of title is prepared and signed and sealed by the Registrar.

(3) After the conversion of an existing register document of title, the existing issue document of title in respect thereof shall continue to be in force and valid for all purposes of this Act until the relevant computer printed issue document of title is prepared and issued to the proprietor.

(4) Any registered proprietor whose land comes within the jurisdiction of a land Registry in which the Computerized Land Registration System is implemented may at any time apply for conversion of an existing issue document of title to a computer printed issue document of title by lodging the existing issue document of title at the said land Registry.

(5) The Registrar may on his own accord convert any existing issue document of title without there being an application made under sub-paragraph (4).

(6) In respect of an existing document of title prepared under the National Land Code, the computer printed document of title shall be prepared as in 5BK, 5CK, 5DK, 5EK, 11AK or 11BK, as the case may be, with the plan of the land in Form B1 or B2, as the case may be.

(7) In respect of an existing document of title prepared under the previous land law, the computer printed document of title shall bear the like title with the plan of the land in Form B1 or B2, as the case may be.

(8) The title to be issued under subparagraph (7) shall be deemed to be a title in continuation.

(9) Upon the conversion of an existing document of title to a computer printed document of title under the preceding sub-paragraphs, the Registrar shall:

(a) make two copies of the plan from the existing register document of title, where in the case for final title, from the copy as approved by the Director of Survey and Mapping under paragraph 396(1)(e), in Form B1 or B2, as the case may be, and shall be duly authenticated under his hand and seal;

(b) endorse across the face of the existing register document of title to the effect that the title in question has been converted to the computer printed register document of title; and on the making of such endorsement the existing register document of title shall be deemed to have been cancelled;

(c) call upon the proprietor to take delivery of the computer printed issue document of title and the plan of the land: provided that where the conversion is effected by the Registrar on his own accord under sub-paragraph (5), he shall not be obliged to deliver to the proprietor the computer printed issue document of title unless the existing issue document of title is produced to him; and

(d) cancel and destroy the existing document of title when submitted to him.

[21] It should be observed at the outset that prior to computerization, there were always two copies of the manual IDT, one kept by D8-D12 and the other by the proprietor. Under the scheme of conversion set out in s. 8 of the 14th Schedule, the computerized IDT will have been validly issued and effective when firstly the manual IDT in the possession of D8-D12 is endorsed and cancelled, and secondly the proprietor is called upon to take delivery of the computerized IDT in exchange for the manual IDT in the possession of the proprietor, and thirdly when the manual IDT is destroyed.

[22] It is worth mentioning that until a computerized IDT is issued to the proprietor, the previous manual IDT remains in force and is valid. Significantly as well, the computerized IDT is not a new title, but rather a title in continuation from the previous manual IDT. And this process usually occurs when there is a dealing upon the land in question as confirmed by the evidence of DW10, witness for D8-D12, who testified as follows in answers to questions by the court:

A : Bukan. Penukaran convert manual kepada computer adalah urusan untuk hakmilik rekod Pejabat Tanah sahaja. Bagi hakmilik-hakmilik pemilik asal, yang memegang geran-geran besar, masih berkuatkuasa dan apabila contohnya mereka nak membuat pindah milik, mereka menyerahkan geran tersebut dan kita membuat urusan tersebut, kita beri geran kepada hakmilik computer yang baru.

J : So lepas, apabila ada urusan, barulah ambil balik dia punya geran asal lah?

A : Bagi pemilik-pemilik exercisenya begitu.

J : So ambil baliklah yang asal.

A : Kita ambil balik yang asal tu ... A

J : Yang itu tak bagi balik lagi ...

A : Itu destroyed.

J : Destroylah. B

A : Kita musnahkan.

[23] With that being the process set out under the law, the question is – was it followed in the present case? The evidence revealed the following. C

[24] On 12 June 2002, an entry or conversion of Lot 14942 into the SPTB was done by one Mohamad Yusoff bin Omar as the conversion officer and one Anisa Mohd Salleh as the data entry clerk. This was confirmed by the DW12, the Information Technology Officer based at the office of the Director of Lands and Mines. D

[25] On the same date, an endorsement of cancellation was made to the manual IDT in the possession of D8-D12 pursuant to s. 8(9)(b), 14th Schedule, as is evident from exh. P1 and confirmed by DW10. However, as conceded by DW10, no notification was issued to the plaintiff proprietor pursuant to s. 8(9)(c), 14th Schedule for the plaintiff to take delivery of the computerized IDT in exchange for the manual IDT in the plaintiff's name and possession. DW10 also conceded that there was no cancellation or destruction of the manual IDT in the name and possession of the plaintiff proprietor pursuant to s. 8(9)(d), 14th Schedule, especially given that the said manual IDT was still in the possession of the plaintiff, the original of which was produced and inspected by DW10. Not surprisingly, no computerized IDT has been issued to the plaintiff. E F G

[26] In spite of this, it appears that a computerized IDT for Lot 14942 was issued and printed on 12 June 2002 in the name of D1. This occurred notwithstanding the fact that the plaintiff had the manual IDT in its continuous possession and custody, and that it had not entered into any dealing *vis-a-vis* Lot 14942. H

[27] Now D8-D12 were trying to suggest that the computerized IDT in the name of D1 was not issued by them. However, the evidence of DW11, the Land Registry officer who processed the I

transfer of Lot 14942 from D1 to D3-D5 around 18 December 2007, stated in evidence that at the time he sighted the computerized IDT in the name of D1, it appeared to be the standard blue security paper and bore the stamp and signature of someone purporting to be the Registrar of Titles. D8-D12 are unable to deny this because no inquiry was undertaken by them to ascertain the identity of the signature on the said computerized IDT in the name of D1.

[28] The net effect of the evidence is that the computerized IDT in the name of D1 was issued in breach of the mandatory provisions of the 14th Schedule of the NLC with the result that there were now two titles – one in the name of the plaintiff and the other in the name of D1 and now D7.

[29] In the Federal Court case of *Tan Chiw Thoo v. Tee Kim Kuay* [1997] 1 CLJ 541, two documents of title were issued for the same piece of land. The first title holder ("the respondent") was issued a document of title of the lot registered in September 1968 while the second title holder ("the appellant") was issued with another document of title for the lot in December 1972. Both the appellant and the respondent were claiming to be the lawful owner.

[30] In delivering the judgment of the Federal Court, Peh Swee Chin FCJ stated (at pp. 229-230):

> The learned trial judge, on the question of indefeasibility of title correctly relied on s. 340 of the Code and *Bank Bumiputra Malaysia Bhd v. Mahmud bin Hj Mohd Din (Datin Hjh Salma bte Mohd Jamin, Intervener)* [1989] 1 MLJ 381. Alienation of the lot which was State land had taken effect upon registration of the register document of title to the first title holder in September 1968. Such indefeasibility of title can only be defeated by any of the specified statutory grounds of fraud, etc under s. 340 or other grounds of equity, see for example, *Tham Kong v. Oh Hiam & Ors* [1968] 1 MLJ 44. None of such statutory grounds or other grounds of equity relating to the issue of the document of title to the first title holder exists. The indefeasibility of title for the first title holder cannot be challenged.
>
> Clearly, it follows that the document of title of the second title holder is void against that of the first title holder. On another alternatively sufficient ground, apart from indefeasibility of title, it is void also as a document of title to land, and therefore against

the first title holder also, because the lot could not be alienated by the state authority, since it was no longer State land. To alienate it in these circumstances would be a wanton disregard of the express statutory provisions which provide for alienation only of State land such that it would amount to a failure to observe the mandatory statutory provisions of the Code. See *Pow Hing & Anor v. Registrar of Titles, Malacca* [1981] 1 MLJ 155 (FC). The purported alienation to the second title holder was a nullity, in our opinion, to such an extent on the facts of this case, that had there been a purchaser in good faith and for valuable consideration of the title of the second title holder, for the sake of illustration, such a purchaser would have obtained neither title nor interest of the lot, in other words, the proviso to sub-s (3) of s. 340 of the Code would not apply to assist such a purchaser.

[31] In the recent High Court decision of *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271, problems arose also as a result of the computerization of land titles. In that case, the computerization process resulted in the name "Liptown" being keyed into the SPTB instead of the plaintiff "Uptown". The land office admitted that the keying-in of the name "Liptown" was an error and accepted that the manual IDT in the name of "Uptown" was still valid. As no notification was issued to "Uptown", Prasad Sandosham Abraham J held that the computerized IDT was issued in contravention of the 14th Schedule of the NLC and was therefore void. His Lordship further held that such issuance of the duplicate title was unlawful and *ultra vires* and any instrument executed in reliance of that title was void and liable to be set aside under the principle of deferred defeasibility.

[32] In the instant case, there were now two titles. Obviously, as noted earlier, the second title in the name of D1 ought not to have been issued. This much was conceded by DW10, giving evidence for D8-D12, that the original manual IDT in the plaintiff's possession was the valid title. He confirmed that the plaintiff ought to have been named as the proprietor of Lot 14942 in the SPTB. The learned Senior Federal Counsel for D8-D12 candidly admitted in his submission that only the plaintiff had the valid title.

[33] The issuance of the second title was without doubt due to a grave failure by D8-D12 to adhere to the strict mandatory provisions set out in the 14th Schedule of the NLC. There was no notification to the plaintiff as proprietor of Lot 14942 to take delivery of the computerized IDT in exchange for the manual IDT in the plaintiff's name and in its possession. There was also no cancellation or destruction of the manual IDT in the name and possession of the plaintiff proprietor. The plaintiff was never issued with the title in computerized IDT in its name as a title in continuation as was required under the 14th Schedule.

[34] The issuance of a computerized IDT in the name of D1, being a breach of the provisions of the 14th Schedule, of the NLC, was *ultra vires* and unlawful. Clearly, the plaintiff was deprived of its land in violation of art. 13(1) of the Federal Constitution which states: "No person shall be deprived of property save in accordance with law". It must follow that the IDT issued in the name of D1 was a nullity and void with the effect that any other instruments executed thereon must also be void and liable to be set aside at the instance of the rightful registered proprietor.

[35] I would also add for the avoidance of any doubt that in view of the void title at its inception subsequent *bona fide* purchasers for value cannot avail themselves to the protection as afforded by the proviso to sub-s. (3) of s. 340 NLC. Admittedly, this appears to go against the principle of the conclusiveness of the register of titles under the Malaysian Torrens System. However, as maintained earlier, this was really a case of a clash of titles, the second of which was issued *ultra vires* the NLC rendering it unlawful. An unlawful title cannot provide the basis for conclusiveness.

[36] In this regard as well, a distinction must be drawn between the instant case and other cases such as *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 and *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269. In *Adorna Properties*, a fraudster impersonated Mrs Boonsom Boonyanit, forged her signature and obtained a properly issued duplicate title and used it to deal with the land. In *Tan Ying Hong*, an imposter forged a power of attorney and executed two charges upon the land, which charges were registered in compliance with the NLC. In these two

cases, and most other cases as well, the instruments under attack were the subsidiary instruments and not the title itself. In other words, there was no issue with respect to the title being good and valid or otherwise in those cases.

[37] In the result, and for the reasons stated, the title issued to D7 has to be cancelled and the plaintiff restored as the registered proprietor and the true legal and beneficial owner of Lot 14942.

Breach Of Statutory Duty And Negligence Of D8-D12

[38] In view of my decision that D7's title must be cancelled, D7 will obviously suffer losses not least the sum of RM1.4 million plus paid for the transfer of the title from D6 to him. D7 has claimed for contribution and indemnity from D8-D12 on the grounds of breach of statutory duty and negligence.

[39] Now D7 has also claimed for contribution and indemnity from D6. There was a suggestion from the plaintiff that if the instruments of transfer and dealings are declared null and void, then s. 66 of the Contracts Act 1950 will apply. However, this contention was resisted by the defendants on the ground that it only affects parties to a contract.

[40] It is interesting to note that D6 has also claimed for contribution and indemnity from D8-D12 on the same ground as D7 in the event that he suffers losses. So instead of going around in circles, and for convenience, the crux is whether D8-D12 were in breach of statutory duty or were guilty of negligence such that they have to account to D7 for all losses and expenses.

[41] With respect to the liability of D8-D12, it can hardly be disputed that as public officers, they owe a duty to maintain a proper register so as to ensure that landowners' interests as per the register are safeguarded at all times as well as to ensure the procedure prescribed under the NLC is stringently followed in order to protect those interests.

[42] As described earlier, D8-D12 were responsible for issuing the computerized title deed for Lot 14942 in favour of D1 in breach of the strict procedure set down in Schedule 14 of the NLC. The disquieting feature of the events here is that although no instrument of dealing whatsoever in favour of D1 was filed, she

was nevertheless issued a computerized IDT on 12 June 2002. This occurred while the plaintiff was still holding on to the original manual title deed for Lot 14942 oblivious of what was transpiring at the land office.

[43] So how could this have happened? D8-D12 appear to suggest that the computerized IDT was not issued by them and they cannot be held liable for any misuse of the computer system. That however sounds unconvincing when confronted with the fact that the computerized IDT issued to D1 was on a blue security paper of D8-D12 with the signature and seal of the Registrar of Titles. This was admitted by DW11 as follows:

> Q : Tidak ada? Macam mana dia keluar nama Norlieda?
>
> A : Pejabat Tanah telah membuat laporan bahawa ada satu pencerobohan system YA.
>
> Q : En. Azli ya, saya rujuk kepada soalan 10 dalam Penyataan Saksi, soalan 10 ya, dan jawapan En. Azli ya, bahawa hakmilik asal atas nama D1 dicetak menggunakan kertas keselamatan berwarna biru mempunyai nama Defendan 1, mempunyai tanda tangan dan cop pendaftar hakmilik.
>
> A : Ya
>
> Q : Sahkan ya?
>
> A : Ya

[44] D8-D12 also appear to admit in their defence that there was an instance of computer hacking into the SPTB system which caused the issuance of the computerized title deed to D1. This was also raised in their submissions at the end of the trial. Can this be a defence to a claim in negligence and breach of statutory duty?

[45] In this regard, DW12 admitted that the security system at the time of implementation was low. This was supported by the answer of D8-D12 in the interrogatory prior to trial as follows:

> 2. Merujuk kepada perenggan 3, pada tahun 2001 hingga 2006 capaian pengkalan data SPTB menggunakan ID dan Kata laluan yang sama di seluruh Malaysia yang mana membolehkan sesiapa sahaja yang ada dalam rangkaian PerakNet membuat capaian ke atas pangkalan data tersebut. Proses tukar ganti hakmilik manual

kepada hakmilik system sekitar tahun 2001-2002 turut membenarkan proses "conversion" dibuat oleh kakitangan Pentadbiran Tanah Negeri, seksyen computer Pentadbiran Tanah, JKPTG dan pembekal system yang membangunkan SPTB.

[46] In cross-examination, DW12 testified as follows:

Q : Diantara tahun 2001 hingga 2006, En. Zulkifli salah seorang daripada administrator kan?

A : Saya salah satu administrator …

Q : Ya la, so kamu ada user ID?

A : Ya

Q : User ID kamu sama tak dgn kawan kamu lagi satu juga administrator?

A : Daripada kementerian dia ada pentadbir yang dihantar ke peringkat negeri so pentadbir dengan saya tu sama lah. Kami di peringkat tinggi sama.

Q : Samalah. Jadi banyak orang share password lah tu? Masa tu? Ada orang share password lah?

A : Ya

Q : Kongsi?

A : Diantara kami la. Diantara kami.

Q : Dan menurut jawapan disini, muka sebelah tu, password yang dikongsi ini, dikongsi ramai orang daripada berbagai jabatan dan badanlah dari sana? Tengok disana, pentadbiran dalam negeri seksyen computer, pentadbiran tanah, JKKPG dan pembekal system.

A : Itu yang group-group administrator dia ah.

Q : Dan kalau mengikut item 3, masa tu 2001 hingga 2005, system tu, SPTB tu, dia tak boleh, dia takda apa tu, fungsi audit trail ya? Pada masa tu? Audit trail bermaksud sistem tersebut nak rakamkan siapa yang masuk dan apa mereka buat. Betul?

A : Ya, pada masa tu.

A Q : Ya pada masa tu tak da lah. So kalau saya masuk hari ini, sistem akan … beri tahu yang orang kedua siapa yang telah masuk sebelum tu. Dia tak da audit trail la maknanya? Sebab kena terangkan apa audit trail kepada …

B A : Term audit trail ada sebab dalam pengkalan data dia ada satu …

Q : Yang disini digunakan audit trail yang merekod capaian, yang merekod akses lah.

C A : Maknanya audit trail yang tu lah.

Q : Lepas 2006 adalah. Lepas versi 3.0 digunakan ya?

A : Ya.

D **[47]** This was indeed a startling revelation and only served to confirm that D8-D12 had failed to ensure reasonable or adequate security of their computer system. With the computer system under their control, it cannot lie in the mouths of D8-D12 to say that they are not responsible for any misuse of the computer system. In fact, it was plain and obvious and does not require E much prescience and foresight to appreciate that if no care is taken with regard to the computer system, such loss and damage, as has resulted in this case, can and will occur.

F **[48]** This is further compounded by the fact that given the way in which the system was being operated, DW12 admitted that it would have been easier for someone on the "inside" to do what was done. Inspector Zaharah binti Jaafar (PW4), the present Investigating Officer in charge of the investigation into the criminal aspects of this case, testified that investigations revealed elements G of fraud. Considering the evidence in its entirety, the irresistible supposition is that there was fraud going on within the offices of D8-D12. It is also disturbing to note that no inquiry was conducted to ascertain how D1 could have been issued with a computerized IDT or at least none was disclosed to the court. H Such an inquiry would have also greatly assisted the court in dealing with the facts in issue.

I

[49] But the problems do not end there. In the discovery, D8-D12 revealed a report dated 12 December 2009 regarding Lot 14942 entitled "Laporan Kes Pemalsuan Hakmilik Grn 22446 Lot 14942 Mukim Teja Daerah Kampar". The report was prepared by DW12 and is reproduced as follows:

(1) Hakmilik ini telah dibatalkan dan disambung ke 081102GRN00126329 pada 12 Mei 2009.

(2) Semakan ke atas pangkalan data, pemilik semasa kemasukan data adalah Shayo (M) Sdn Bhd. Dapat melalui PMT dengan nombor perserahan 10689/1994.

(3) Kewujudan nama Nurleida binti Sidek dengan no perserahan 199000000 agak meragukan kerana PMT kepada Shayo (M) Sdn Bhd berlaku pada tahun 1994. Status pemilik Shayo (M) Sdn Bhd telah dijadikan tidak kuatkuasa.

(4) Pada tahun 2007, telah berlaku urusan Pindahmilik dengan nombor perserahan 53389/2007 daripada Nurleida binti Sidek 1/1 kepada Kuan Kian Seng ¼, Chee Chik Eng ½ dan Lee Lai Pang ¼.

(5) Tidak dapat dipastikan bila kewujudan nama Nurleida binti Sidek dibuat ke atas pangkalan data tetapi kewujudan nama tersebut dengan nombor perserahan 199000000 agak meragukan.

[50] This report clearly disclosed that something was seriously wrong with respect to Lot 14942. DW12 submitted the report to the officer concerned who asked for it but claimed that as an information technology officer, his job was only to investigate the system and so he didn't follow up in any way. Nevertheless, he was candid enough to reveal something most disconcerting – that he had prepared reports on similar "fraud" cases in the "belas-belas" and the total done by his department came to "puluh-puluh".

[51] From the evidence, it can be surmised that despite the report dated 12 December 2009, no registrar's caveat was lodged until March 2011, no further investigation was done and in fact, as the evidence revealed, D8-D12 thereafter allowed Lot 14942 to be transferred twice more, to D6 and D7.

[52] Furthermore, when the registrar's caveat was eventually lodged on 16 March 2011, D8-D12 were aware that the plaintiff's interest in Lot 14942 was at risk. However, when D6 applied to set aside the registrar's caveat, D8-D12 did not think it fit to inform the plaintiff of the application when the very purpose of the registrar's caveat was to protect the plaintiff's interest.

[53] Given this state of affairs, it would be safe to affirm that D8-D12 had fallen far short of the standard that is to be expected of a public authority and its officers. To put it plainly, they were grossly negligent and in breach of their statutory duties. Given what had transpired, D8-D12 were hardly in a position to claim they had carried out their duties in good faith and were protected by s. 22 of the NLC. It would not be farfetched to deduce that their actions and inactions had seriously undermined public trust and confidence in the land authority maintaining a credible and efficient registry.

[54] In a last throw of the dice, so to speak, D8-D12 submitted that since the actual tortfeasors were not named, there cannot be any liability attached to a government agency. They relied on the Federal Court decision of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 where it was held that in any claim in tort against the government, the government officer who was responsible for the alleged tortuous act must be made a party and his liability must be established before the government could be made vicariously liable as principals. It was further submitted that the plaintiff and the defendants seeking indemnity were aware of the persons making the data entry into the system and these persons ought to have been made parties to the present suit.

[55] With respect, I think there are three difficulties with this submission. Firstly, this question was not pleaded and I am not entirely convinced that it is solely a question of law. I am in agreement with the submission by the parties affected that they have been ambushed with this argument at the last minute.

[56] Secondly, under the NLC and specifically s. 12 and 13, there are designated officers of the government charged with the responsibility of administrating the NLC and all things connected

with it. In my view, these are the officers who are the persons responsible for the torts complained of here, and who according to *Lay Kee Tee*'s case, are the officers who have to be named as defendants to the action. These very same officers are the ones the plaintiff has named as defendants in this action.

[57] Consistent with this approach in the NLC is s. 16(2) of the NLC which provides:

> Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Statutory shall be brought against the State Director in the name of his office.

[58] With this scheme in place, it is ultimately the officers who must bear responsibility. As Lord Denning MR stated in *Ministry of Housing and Local Government v. Sharp and Another* [1970] 2 QB 223:

> Who, then, is to bear the loss? The negligent clerk can, of course, be made to bear it, if he can be found and is worth the money – which is unlikely. Apart from the clerk himself, there is only one person in law who can be made responsible. It is the registrar. He must answer for the mistakes of the clerk and make compensation for the loss. He is a public officer and comes within the settled principle of English law that, when an official duty is laid on a public officer, by statute or by common law, then he is personally responsible for seeing that the duty is carried out. He may, and often does, get a clerk or minor official, to do the duty for him, but, if so, he is answerable for the transgression of the subordinate: see *Sanderson v. Baker* [1972] 3 Wils 309, 317, where Blackstone J states the position of the sheriff. Sometimes it is an absolute duty, in which case he must see that it is performed absolutely: see the instances given by Holt CJ in *Lane v. Cotton* [1701] 1 Ld Raym 646, 651. At other times, it is only a duty to use due diligence, in which case he must see that due diligence is used: see the celebrated judgment of Best CJ in *Henly v. Lyme Corpn* [1828] 5 Bing 91, 107-109. But, in any event, if the duty is broken, and injury is done thereby to one of the public, then the public officer is answerable. The injured person can sue him in the civil courts for compensation …

[59] Thirdly, the allegation of gross negligence and breach of statutory duty is also in relation to the failure to provide a safe and secure system to prevent hacking and internal fraud. This would be the responsibility of D8-D12. This would be akin to a system failure as alluded to in *Muthammal Rose Udayar & Anor v. ACP A Paramasivam & Ors* [2011] 1 LNS 1565 where I had held that there was a system failure at the police station where a detainee had died for which the OCPD was correctly named as the party as he was responsible for the administration of the police station.

[60] For these reasons, D8-D12's submission in this regard must fail. In the premises, I hold that D7 has established liability on the part of D8-D12 for which he is entitled to be indemnified.

Conclusion

[61] In the upshot, and for the reasons stated, the plaintiff's claim against all defendants is allowed including D1 who was served with the writ by way of substituted service but did not enter an appearance. For the same reasons, D7's counterclaim is dismissed. As a result as well, D7's claim for indemnity against D8-D12 is allowed.

[62] Accordingly, there will be judgment for the plaintiff in the form of an order as set out in prayer 25(1), (2), (3), (4) and (5) of the statement of claim. There will be a further order that D8-D12 compensate and indemnity D7 for the whole of the purchase price paid to D6 as well as other reasonable expenses incurred in procuring Lot 14942. If the amount is not agreed, D7 is at liberty to apply to the Senior Assistant Registrar for assessment.

[63] On the issue of costs, it would be hard to argue otherwise that the root cause of this action arising is the negligence and breach of statutory duties of D8-D12 as a result of which the plaintiff was forced to and quite rightly brought in all the defendants. I would therefore order D8-D12 to pay the costs of the plaintiff and the defendants. Considering that the plaintiff had the more arduous task of proving what had transpired with respect to Lot 14942, and which necessitated various applications for discovery and interrogatories, I assessed the costs to be paid by D8-D12 to the plaintiff at RM60,000. D8-D12 will also pay costs

to D2-D5, D6 and D7 at RM20,000 each. D1 is also ordered to pay costs of RM1,500 to the plaintiff taking into account that judgment was obtained in default of appearance.

[64] Last but not least, I wish to record my appreciation to all parties for not only ensuring that the trial was completed within the time allotted but for also the well-researched arguments contained in the submissions which have assisted the court in considering and arriving at a decision on the issues raised at the trial.